No. 13,078

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

ROGER N. LIBBEY,

Appellee.

Appellant's Opening Brief

ARTHUR B. DUNNE
DUNNE, DUNNE & PHELPS
333 Montgomery Street
San Francisco 4, California
Attorneys for Appellant.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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STATUTES AND RULES

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I.

STATEMENT OF THE CASE, JURISDICTION, PLEADINGS AND PROCEEDINGS

A. Jurisdiction.

Plaintiff and appellee, Roger N. Libbey, on August 11, 1950, was on the premises of appellant, Southern Pacific Company, at Roseville, California, as a student fireman. He had gone into the cab of steam locomotive No. 2795 (156)[1] with a hostler to watch the hostler move the loco-

1. Otherwise unidentified arabic numerals within parentheses are page references to the printed transcript of record.

motive. When the locomotive started moving, there was a flash-back of fire from the firebox into the cab. Libbey became frightened, jumped out of the window of the cab of the locomotive and was injured. On October 13, 1950, he sued Southern Pacific Company for $150,000 damages. His complaint purported to go upon two counts, (1) the first under the Federal Employers' Liability Act (45 U.S.C. § 51 ff.) and the Federal Boiler Inspection Act (45 U.S.C. §23), and (2) the second under the Federal Employers' Liability Act alone (3-7). The action was commenced in the United States District Court for the Northern District of California, Southern Division.

The jurisdiction of the court below was claimed to be sustained by a provision of the Federal Employers' Liability Act (45 U.S.C. §56).

The case was tried in the court below, the court sitting with a jury, July 9-11, 1951. At the close of the plaintiff's case, and after defendant had made a motion to dismiss for insufficiency of evidence to warrant submission to the jury, the plaintiff dismissed the first cause of action which claimed violation of the Boiler Inspection Act (248). Defendant's motions to dismiss the case as a whole, made at the close of the plaintiff's case (212-234), and for a directed verdict (266, 267) having been denied (234; 267), the cause was submitted to the jury on the second count under the Federal Employers' Liability Act alone (Instructions 273-288). The jury returned a verdict for plaintiff for $50,000 (29; 292, 293). Judgment on the verdict was filed and docketed July 12, 1951 (29, 30).

On July 17, 1951, appellant served and filed its Notice of Motion for judgment notwithstanding the verdict and for a new trial (31-33), the motions were heard July 27, 1951

(295-328), and were denied August 2 and 3, 1951 (34, 36). Thereupon, and within the time allowed by law, defendant and appellant perfected this appeal (35-41).[2]

The jurisdiction of this court is sustained by 28 U.S.C. §§ 1291, 1294, 2107 and Fed. Rules Civ. Proc., Rule 73.

B. Summary Statement of the Case.

In August 1950 appellee was 27[3] and had a life expectancy of 40.36 years (211). At the age of 18, after 2 years of high school, he entered the Marine Corps in December 1941 (78). He served at Guadalcanal, where he was wounded October 1943 (52, 104). He received a medical discharge on August 18, 1945 (108) with a disability rating

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2. On July 31, 1951, the court signed an order denying the motion for new trial. It was filed August 2, 1951 (34). On August 3, 1951, the court signed an order denying the motion for judgment notwithstanding the verdict. This order was filed August 6, 1951 (36). A notice of appeal was filed August 3, 1951 (35). A supersedeas bond, approved by the court, was filed the same day (37-40). Then appellant, being fearful that the claim might be made that the taking of the appeal was premature because the order denying the motion for judgment notwithstanding the verdict was not filed until August 6, 1951, filed a Supplemental Notice of Appeal, on August 10, 1951 (36, 37). Then out of abundance of caution—there is no reason why the bond should not be filed before the notice of appeal, for such a bond would certainly be considered as "filed with the notice of appeal" (Fed. Rules Civ. Proc., Rule 73(c))—the parties on August 17, 1951, stipulated that the bond filed August 3, 1951, was sufficient in form and as to time of filing, the court ordered accordingly, and the stipulation and order were filed on August 20, 1951 (40, 41). All of this was well within the time for appeal.

The entire record was designated and the entire record was designated for printing, agreeably to the rules of this court, excepting instructions proposed and not given but with an exception to this, i.e., designating for printing two of defendant's proposed instructions not given and to the refusal of which defendant and appellant duly accepted (235).

3. Appellee was born August 24, 1923, so that he was just 13 days short of 27 years old at the time he was hurt (44).

of 70 per cent (170). In January 1946 he entered the Army Transport Corps and served in the merchant marine as a wiper and ordinary seaman until the latter part of 1947 or the early part of 1948. During this service he fell from one deck to another deck of a vessel, and fractured his left knee—the knee of the leg which had been seriously injured at Guadalcanal. For this second injury there was a somewhat extended period of hospitalization (79-82). In August of 1948, in an automobile accident, he fractured his left wrist, was hospitalized for 6 weeks and, because of this injury, did not work until February 1949 (105 ff.). It will be necessary, later, to consider these injuries in detail. At the moment it is enough to notice that he had been seriously injured, and hospitalized for each injury, 3 times before he applied to appellant for work.

Meanwhile, after discharge from the Army Transport Corps, appellee endeavored to work. Apparently he was not very successful at holding jobs. In March and April, 1948, he worked for Sacramento Box (83), then April to June 1948 worked on the green chain at a sawmill (83, 84), and then was digging ditches for a mortuary outfit (85). In August 1948 he was in the automobile accident and received the injury that kept him out of work until February 1949. In February 1950—there seems to be an unexplained break from February 1949 to February 1950—he went to work at McClellan Airfield as a mechanic's helper, earning $190 per month, and was there until August 8, 1950 (75, 77, 103, 104).

On August 9, 1950, appellee applied to Southern Pacific Company Master Mechanic Lonergan at Roseville to be allowed on appellant's premises as a student fireman (45, 110). He was sent to the superintendent's office in Sacra-

mento, there made out an application, was given a physical examination and was sent back to Roseville. On his return to Roseville he reported back to Mr. Lonergan, was sent to Tim Farrell, swing shift roundhouse foreman, and was given instructions by Mr. Farrell (56, 155). Again detailed statement will be necessary and will be made below. That day he followed the fire lighters around on the 3:59 p. m. shift. Next day he was back, again with the fire lighters, until they finished their work, all the fires having been lit. It was then that he went on the engine with hostler Peterson, and the accident occurred (4, 8).[4]

C. The Pleadings.

The pleadings are of little significance. The complaint (3-7) was typical of actions of this sort. The same is true of the answer except for an inadvertent admission that plaintiff was "employed" (8 ff.). A motion to amend the answer, to avoid embarrassment or question, made prior to trial, was denied without prejudice to renewing it (11-18). It was renewed, granted and the amendment was filed (18-26). These proceedings were reported but not originally transcribed (42) and are brought here by supplemental transcript. The amendment was permitted by the judge before whom the case was tried. It was agreed, in effect, in these discussions, by counsel and the court, that all issues presented by the evidence would be tried. All such issues were tried. At no point was there any objection that any evidence offered was not within the issue or that any point

4. The time and place are admitted by the pleadings, were testified to by appellee, and as to these matters there never was a question.

raised by either side could not be raised because not properly put in issue.

The short of this matter is that the issues were those which were actually tried in the court below.

D. Issues Before This Court.

There is now no question of violation of the Boiler Inspection Act. The count in the complaint based upon that Act was dismissed (see p. 2 above).

In this court there will be no issue of negligence or contributory negligence. When the locomotive was started there was a back-flash of fire, from the firebox, into the cab because the firebox door had been propped open with a sand scoop. The door should have been closed. Appellant will not question that this was negligence which was a proximate cause of injury to the plaintiff. The answer set up the negligence of appellee. This question was resolved against appellant by the jury. No question of appellee's negligence will now be made.

The issues here, and the matters about which they revolve, can be stated briefly:

The Federal Employers' Liability Act imposes liability for personal injury only upon a "common carrier by railroad while engaged in commerce between any of the several states" for injury "to any persons suffering injury **while he is employed** by such carrier **in such commerce.**" (45 U.S.C. § 51).[5] It requires proof by the plaintiff that he is an

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5. Before 1939 the employee had the burden of proving (*So. Pac. Co. v. Middleton*, 54 F.2d 833 (Circ. 5); *Onley v. Lehigh V. R. Co.*, 36 F.2d 705 (Circ. 2—cert. den. 281 U.S. 743, 74 L.ed. 1156); *Johnson v. So. Pac. Co.*, 199 Cal. 126, 131) that at the very moment of injury,—"at the time of his injury",—he was engaged "in interstate transportation or work so closely related

"employee"[6] and that at the time of injury he was engaged in interstate commerce within the meaning of the Act.[5] In this case the two matters are closely related. Did appellee present sufficient evidence to warrant submission to the jury of the question whether he was an "employee" and, if so, whether he was engaged in interstate commerce? If he did then on this matter there is a farther question whether the court erred in excluding evidence tendered by appellant and touching upon these issues. (See Assignments of Error Nos. 6 and 7.)

Assuming it was established that appellee was an employee engaged in interstate commerce, so far as his relation in general to appellant was concerned, the next question is whether it did not appear as matter of law that he had departed from the scope of his "employment" so as to make the statute inapplicable or at least a question for the jury which the court should have submitted (it did not). (See Assignment of Error No. 4.) Here is also a question

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thereto as to be practically a part of it." (*N. Y., New Haven & Hartford R. Co. v. Bezue,* 284 U.S. 415, 417, 76 L.ed. 370; *Shanks v. Delaware etc. Co.,* 239 U.S. 556, 60 L.ed. 436; *Illinois C. R. Co. v. Behrens,* 233 U.S. 473, 58 L.ed. 1051; *Chicago etc. Co. v. Bolle,* 284 U.S. 74, 76 L.ed. 173; *Chicago etc. R. Co. v. Ind. Com'n,* 284 U.S. 296, 76 L.ed. 304.) By amendment, in 1939, the scope of application of the statute was enlarged in this regard to provide: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce **as above set forth** shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce" (45 U.S.C. § 51).

6. *Robinson v. B. & O. R. Co.,* 237 U.S. 84, 59 L.ed. 849: "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe **the conventional relation of employer and employee.**" This language was approved in *Hull v. Phila. & R. R. Co.,* 252 U.S. 457, 479, 64 L.ed. 670, 673. See the *Bourne Case,* p. 55 below.

whether the court should have admitted evidence bearing on this issue and offered by appellant. (Assignment of Error No. 5).

Thirdly: Appellant raised the point that appellee induced his claimed relationship with appellant by perpetrating a fraud that went to the heart of the claimed relationship. As to this there was probably a jury question. Assuming that there was, there is a question whether the court properly excluded evidence offered by appellant (Assignment of Error No. 8).

Finally, there is a question whether the award was not so excessive that this court should give relief.

It is believed that the foregoing statement of the question, in general form, when taken with the specification of errors, will sufficiently indicate what we propose to argue.

II.

SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in denying appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict upon the ground that there was no evidence to show that appellee was an "employee" or engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

2. The court erred in denying appellant's motion for a directed verdict and for judgment notwithstanding the verdict upon the ground that it appeared as matter of law that appellee had departed from any assumed employment at the time he was injured.

3. With respect to the question of departure from any assumed employment the court erred in ruling as matter

of law that he had not so departed and that there was no evidence to make an issue of fact for the jury upon this and in refusing to submit this issue to the jury. (See Assignment of Error No. 4 and see remarks on argument of motion for new trial (311, 312).)

4. The court below erred in denying appellant's proposed instructions Nos. 22 and 23 which would have submitted to the jury the question whether appellee had departed from any assumed employment so that the Federal Employers' Liability Act was inapplicable at the time of his injury. The requested instructions are set out in the printed record at pp. 26 and 27. The proposed instructions are as follows:

"DEFENSE INSTRUCTION No. 22

"Event if plaintiff is considered as having been employed by the defendant when he went upon the defendant's premises as a student fireman because he performed service for the defendant, still if you find that under the instructions of the foreman in charge the plaintiff on the shift on which the accident happened was instructed to accompany the fire lighters and learn to light fires and for his own benefit and convenience and in his own interest and without any instructions from defendant, and not for the purpose of performing any service for the defendant, deviated from the line of activity designated for him on his shift and went upon the locomotive, he then departed from the course and scope of any employment, and if he was injured while he was so in the course of departure, your verdict must be in favor of defendant Southern Pacific Company.

"DEFENSE INSTRUCTION No. 23

"If you find that in going upon the locomotive the plaintiff did so either on the instructions or at the request of Hostler Petersen, and Petersen did not request him to do so because of any emergency or to perform any service, but solely in order that plaintiff, for his own benefit, might observe the operation of the locomotive, then I instruct you that such direction or request or invitation from Petersen could not and did not obviate or modify or set aside any earlier and contrary instructions, if any, or any other instructions as to what plaintiff should do, given to plaintiff by the foreman in charge, and any such direction or invitation from Petersen was not an instruction to perform service on behalf of the defendant."

At the trial error was assigned (290) as follows:

"Mr. Dunne: You Honor, please, we respectfully except to the refusal of defense proposed instructions Nos. 22 and 23. No. 22 is the Harmon case, told the Jury even if this young man was in a status of employee, if, on a particular occasion when he was injured he had departed from the course of his instructions in his own interest and benefit and deviated from the line of activity designated on the shift and went on the locomotive, then he had departed from the course and scope of any employment and could not recover.

"And in connection with the same thing, Instruction No. 23, hostler Petersen had no authority to set aside or modify any earlier directions or instructions which the plaintiff may have received by requesting him to go upon the locomotive and that a request from Petersen or an invitation from Petersen did not obviate or set aside earlier or contrary instructions.

"The Court: Are those the only two?

"Mr. Dunne: Only those.

"The Court: I purposefully did not give those instructions and you may have it for the record so that you may have it for your protection as well, because I did not feel the facts of this particular case justified the giving of that instruction, not because I had any particular quarrel with that as a statement."

5. The court erred in excluding Rule 864 of the Transportation Rules of appellant offered by appellant, after the circumstances had been shown (see p. 30 ff. below), on the question of appellee's departure from the course and scope of any assumed employment by going upon locomotive 2795 (237 ff.).

"Mr. Dunne: I think that is all I have at the moment. I will have two rules. I will call counsel's attention to them; one of which bears on this matter of employment, and the other which bears——

"The Court: Hadn't you better present that when the jury is here?

"Mr. Dunne: Yes, I want to do that, but simply want to ask Mr. Ryan, I assume he will give me the accommodation, if I can read them, if otherwise relevant, Rule 864 of the Transportation Rules, that is, unauthorized persons not to be allowed on moving locomotives.

"Mr. Ryan: I don't know it offhand.

"Mr. Dunne: You don't want me to bring a witness to prove that——

"Mr. Ryan: Absolutely not. I have a book." (236, 237).

"Mr. Dunne: Now, how about that Rule 864?

"Mr. Ryan: Do you have it with you?

"Mr. Dunne: Yes.

"Mr. Ryan: Oh, I am going to make an objection. Trying to read this afternoon?" (240)[7]

"Mr. Dunne: 864.

"Mr. Ryan: The other one. Well, I am going to object to this rule being read on the ground it is not applicable.

"The Court: What rule are you referring to?

"Mr. Ryan: Referring to Rule 864 of the Rules and Regulations of the Transportation Department. It reads as follows:

> 'Persons must not be permitted to ride on an engine or in a baggage, mail or express car without a written order from the proper authority, except employees in the discharge of their duties and those holding transportation endorsed to that effect.'

"I submit that is used to keep tramps and unauthorized persons, outside people off the engines and——

"Mr. Dunne: Student firemen in the roundhouse.

"Mr. Ryan: 'Except employees in the discharge of their duties.'

"Now, under the Watkins case it holds that the student fireman, while observing, is in the discharge of his duties and that's what Mr. Libbey was on that engine 4, because he testified that——

"The Court: I don't think you need to labor that. I am inclined to think that the rule is not pertinent, Mr. Dunne, to this matter, because the relationship—it is clear from the document and testimony that that

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7. In the absence of the jury appellant offered Rule 864 and Section 16 of Article 51 of the Fireman's Agreement. At this point Rule 864 was being offered but counsel on the other side at this precise point started with his discussion of, and objection to, Section 16 of Article 51 of the Fireman's Agreement. See (240). This matter is set out in Assignment 7 below to the rejection of the provision of the Fireman's Agreement. The continuity is indicated in these Assignments by picking up the first sentence of his objection. See footnote 9 below.

is what the young man was there for, to make observation. He had to do that by getting on the engine.

"Mr. Ryan: Had to do that to light the fires and watch the fire lighters.

"Mr. Dunne: I want to make the record clear that our point is that the only evidence in this case is that he was instructed to accompany fire lighters. He had no instructions of any kind to ride on a moving locomotive. There was no evidence that fire lighters ever are on moving locomotives or have any function on moving locomotives. Our position is that until he had finished his two turns in the roundhouse, his only function was to accompany the fire lighters as told and he was going outside of the scope of his instructions, duties, or whatever they may be called, when he got on to an engine to watch an engine to be moved.

"Mr. Ryan: The answer is that Libbey's testimony where he said the roundhouse foreman Farrell had told him as follows, and I quote:

> 'Keep your eyes and ears open and learn everything you can about being a fireman.'

One thing he had to learn about, being a fireman, was how his engine was operated, because indeed it is firemen who act as hostlers in movements.

"The Court: Well, I don't think you need to labor the point. I personally doubt that it would have any pertinency here. It is obviously intended to cover other situations than that of a person learning to be a fireman. In and of itself the presence of the young man as an observer on the engine certainly is innocuous, no matter what stage of the proceeding, of his learning. I would rather think that would be a forced and unfair interpretation.

"Mr. Dunne: Of course, it is also a restriction on any authority, any invitation from Petersen offering it in that connection, too.

"The Court: I will sustain the objection to that. It has been read into evidence so that——

"Mr. Dunne: It has been read in the record.

"The Court: Read in the record.

"Mr. Dunne: May that reading serve as my offer?

"The Court: That may serve as your offer, and I will sustain the objection." (243-245)

6. The court erred in excluding appellant's Exhibit A for identification, offered after the circumstances had been shown (see p. 30 ff. below), on the question whether appellee was an employee of appellant within the meaning of the Federal Employers' Liability Act and in this regard erred both in rejecting the document as a whole and in rejecting the first paragraph which was separately offered (25, 26; 111-113; 214 ff.).[8] This is the record:

"Q. Let me show you this paper and ask you if the signature 'Roger Norman Libbey' is your signature?

"A. Yes, sir.

"Q. And that was signed by you at Sacramento on the 9th of August, 1950?

"A. Yes, sir.

"Q. Now, was that when you first went there or after you came back from the doctor?

"A. I believe it was after I went to the doctor, because it says, 'I assume all risk,' and everything.

"Mr. Dunne: All right, we will offer this as our next exhibit in order.

"Mr. Ryan: Your Honor, I object to that on the ground it is incompetent, irrelevant and immaterial,

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8. The document which became defendant's Exhibit A for identification is the document copy of which was attached to appellant's Amendment to Answer (23-26). It is printed as part of the Amendment to the Answer (25-26) and, therefore, in printing the record was not reprinted.

and it will revolve around the points of law that we will have to discuss later with your Honor. I object to it specifically on the ground that it is irrelevant, because it is given in violation of Section 5 of the Federal Employers Liability Act, and I won't argue it now, but just state that.

"Mr. Dunne: Counsel went in very fully to what happened at the time he first made application. Now this is part of that same story.

"Mr. Ryan: Yes, but, your Honor, I submit, I will go into that, that a waiver such as is contained there is against the policy of the law and is illegal, as a scheme or device to try to avoid liability in cases of this sort. And Section 5 of the Federal Employers' Liability Act specifically prohibits those kind of contracts being legal.

"Mr. Dunne: That's if there is employment under the Act.

"Mr. Ryan: Yes.

"Mr. Dunne: We haven't reached to that question yet.

"Mr. Ryan: But I submit that he has already, the testimony so far shows that he was an employee, and under that case that I cited to your Honor, a student fireman is an employee under the circumstances such as these.

"The Court: Well, all this is a waiver, an exemption.

"Mr. Dunne: Well there is also some recitation at the beginning of that which may reflect on what the relationship was. That is a question as yet to be determined, and it can't be determined by telling half the story.

"The Court: Well, I will reserve ruling on that. The only point is whether or not this should be read

to the jury or given to the jury at this time or not. The plaintiff just said that he signed it. We will mark it for identification as No. A for the defendant, and I will reserve ruling on it, whether it should be admitted. Defendant's Exhibit A.

"The Clerk: Defendant's Exhibit A marked for identification.

"(Whereupon document identified above was marked defendant's Exhibit No. A for identification only.)" (111-113)

"Application for Permission to Observe Operations of Locomotives, Cars and Trains

"Whereas, I, the undersigned, Roger M. Libbey, residing at Citrus Heights in the State of California, and being 27 years of age, have applied to Southern Pacific Company for permission to enter and ride upon the locomotives, trains and cars of said Company for the purpose of observing the operations of the railroad of said Company **with the understanding that I shall be under no obligation to perform any work or service upon said railroad until employed by said Company,** and that neither said Company nor I shall be under any obligation with respect to my entering the employ of said Company at any time, and

"Whereas, said Company is willing to grant my request upon the understanding above expressed, subject to the further condition that I assume all risks of injury which may be sustained by me while upon the premises of said Company or while riding its locomotives, cars or trains,

"Now, Therefore, in consideration of said Company granting my said request, I do hereby assume all risks of injury which may be sustained by me while upon or about the property or premises of said Company, and I hereby release and discharge said Company, and the

officers and employees thereof, from any and all claims, demands, suits and liabilities of any kind for death or for any injury that I may sustain while upon or about said property or premises.

"Signed at Sacramento, State of California, this 9th day of August, 1950.

" /s/ ROGER NORMAN LIBBEY.

"Witness:

" /s/ M. PALMITER." (25-26)

"Now the second matter, which I don't know whether it is appropriate at this time or should be ruled on, but I want to renew again the offer of defendant's Exhibit A. That, your Honor may recall, is this form of application to observe the operation of locomotives, cars and trains. It is the one in which that——

"The Court: Yes, I understand.

"Mr. Dunne: You understand that. Now of course the question arises as to whether or not the provision as to assumption of risk would be valid. As I suggested to your Honor, if it is determined conclusively that this man was an employee and the Act applies, then that is obviously not good under Section 5.

"The Court: I don't see that there is really any point to that, Mr. Dunne, because to admit it would require a holding that the Act does not apply, and if the Act does not apply, then of course the defendant is not liable. So isn't that the [194] situation?

"Mr. Dunne: But isn't there a question of fact for the jury to determine whether this man was employed?

"The Court: Well, if the jury decides that he was——

"Mr. Dunne: Employed——

"The Court: ——an employee, then this would not be applicable.

"Mr. Dunne: That's right.

"The Court: But if the jury decides that he was not an employee, then the verdict would have to be for the defendant.

"Mr. Dunne: For the defendant anyway.

"The Court: So I don't see how that——" (214, 215).

"The Court: If the plaintiff were not an employee, then the action fails. And if he was an employee, then under the Federal Employers Liability Act, Section 55, I think it is—45 U.S.C. 55, then this agreement would be invalid.

"Mr. Dunne: That's right. If he were an employee. There is no question about that, your Honor.

"Now then, in view of that I offer separately and severally as a distinct offer, the heading on this document, the first paragraph, excepting the last word 'and' which indicates that it carries on to something else. And then the last two lines, which is the place and the date, and then the line for the signature.

"Now that is an independent order; if your Honor will look [at] it, you can see it will bear specifically on this question of fact as to whether or not this man is an employee.

"The Court (Examining): You say the last paragraph?

"Mr. Ryan: No, just the first paragraph.

"Mr. Dunne: Yes, the first paragraph, and then of course, enough to pick it up for the signature and the date.

"The Court: Well, I don't think that dissecting the document in that way would amount or would have any meaning, or, inasmuch as there were other docu-

ments that were signed and are now in evidence, that fix the conditions and show the purpose of it, show the relationship between the plaintiff and the defendant——

"Mr. Dunne: Well, those, I think not, your Honor; there are applications, and only in a remote sense. Now this is a document that is part of the same transaction. It bears on the relationship that the parties bore to each other. In other words, the circumstances under which he was on the premises. In his agreement to the provisions of that first paragraph, the least that can be said of them is that they are one item of fact.

"The Court: That I don't agree with you on, but the paragraph has no meaning unless it is a whereas clause, unless it is connected with the purpose and objective of this document, which is for the purpose of waiver of assumption of risk. I don't think you could take out of a document that is intended for that purpose something that applied for a different purpose.

"Mr. Dunne: Well then, the whole thing ought to come in with an instruction from your Honor as to when the assumption of risk provision is good and when it is not good; because we can't dissect the facts. It is part of the facts.

"The Court: Well, it seems to me that the interests of justice require that this document be not admitted into evidence. I don't see that it serves any useful purpose, because as I say, it is determined that the plaintiff was covered by the Act, that the Act did apply—if that is determined, then the document itself wouldn't be invalid under Section 55 of the Act. And if, of course, it is determined that he was not an employee, and the Act doesn't apply, then the Court would have to instruct for a verdict for the defendant in the case, irrespective of Mr. Ryan's contention that he might

still proceed in a common law action. So for that reason, I think——

"Mr. Dunne: So there will be no mistake on the record as to my offer, I am offering it now both as a whole and as to that first paragraph, as a separate offer, as one of the items of fact going to show what the relationship between the plaintiff and the defendant was at the time he was in the roundhouse.

"The Court: Yes, I understand the full purpose of the offer, and I will hold that for neither purpose is the document admissible—neither in whole or in part." (218-220).

7. The court erred in excluding a portion of the "Firemen's Agreement" offered by appellant after a showing of the circumstances and as bearing on the question of appellee's status (237 ff.).

"Mr. Dunne: I think that is all I have at the moment. I will have two rules. I will call counsel's attention to them; * * *. And the same thing, I think it is Section 6 or 16 or [of] Article 51 of the Firemen's Agreement.

"Mr. Ryan: Article 51, got it here?

"Mr. Dunne: Yes. It is the 90-day provision. There is a provision under the Fireman's Agreement, if your Honor please, that once these men have passed, taken all their student trips and otherwise qualified, they are hired and go on pay, and then thereafter, Section 16, there is a 90-day period in which we may terminate their services without cause for any reason, and if we don't do it within that 90-day period, then we can terminate only for cause and under the provisions of the Act. I offer it to show that there are three gradations in this matter of permanent employment, the student status, whatever that may be, temporary status, 90

days, and then permanent status. It is a matter, I think, which probably [ad]dresses itself more to your Honor than to the jury. As a practical matter that is what the section is, the Firemen's Agreement. I just wanted to know whether counsel wanted me to call a witness.

"Mr. Ryan: You won't have to call anybody to identify, I will admit the Agreement, but still reserve my right——

"Mr. Dunne: That is right." (237 238).

"Mr. Ryan:[9] Oh, I am going to make an objection. Trying to read this afternoon?

"Mr. Dunne: Whenever——

"Mr. Ryan: For instance, want to object to this latter sentence, latter part of it says——

"The Court: What are you reading, so the record is clear?

Mr. Ryan: Reading now from the Firemen's Agreement that counsel handed me.

"The Court: What section?

"Mr. Ryan: Section——

"Mr. Dunne: 16 of Article 51.

"Mr. Ryan: Of Article 51. The last sentence reads as follows:

> 'When applicant is not notified to the contrary within the time stated, it will be understood that the applicant becomes an accepted employee, but this rule shall not operate to prevent the removal from service of such applicant, if subsequent to the expiration of 90 days it is found that information given by him in his application is false.'

"Now, I am going to object to that on the ground that it is incompetent, irrelevant and immaterial and self-serving on several grounds. Number one, he was

9. See footnote No. 7.

not a fireman at the time this accident happened, he was a student fireman, and the agreement wouldn't even begin to cover him until such time as he had passed the examination and been accepted by the company as a fireman. Secondly, I say that it is, further, that information given by him in his application is false, even under the law and even under that agreement they couldn't fire him unless that was a material allegation, and I submit that after their own company doctor had accepted him and passed him with knowledge of his injuries and knowledge of his compound fracture in the other leg they would waive any such finding.

"The Court: Mr. Dunne, how is the provision of the Firemen's Agreement applicable here? Does it specifically say that it applies to student firemen?

"Mr. Dunne: As a matter of fact, your Honor, it does not. The Firemen's Agreement does not apply to student firemen. There have been all sorts of discussions before all sorts of bodies about that, but it does not. At this time I am not offering it for what counsel seems to be bothered with, I am offering it for the purpose of showing that between a student fireman and a permanent employee there is still an intermediate stage of temporary employment and I say to your Honor that I am calling attention to the existence of this rule because it has—attention has been called to it in some of the cases that have distinguished this question of fraud and have indicated that the man even though he has passed beyond that 90-day period, that they had——

"The Court: The company still has the right to——

"Mr. Dunne: That is right.

"The Court: Not to complete his employment?

"Mr. Dunne: That is right.

"The Court: On that ground.

"Mr. Dunne: And it is in connection with that that I am offering the rule.

"Mr. Ryan: I will object on the ground it doesn't apply to the plaintiff in this case because he was not a fireman and not a party to the agreement.

"The Court: I think that the precise provision in this agreement would be subject to Mr. Ryan's objection. The subject matter that you are discussing, however, might be presented in some manner to the jury, but I don't think this rule, that it would be competent to read the rule and agreement that it is not applicable.

"Mr. Dunne: May Mr. Ryan's reading of the rule be taken as my offer of the rule, then?

"The Court: Yes, I will sustain the objection." (240-243).

8. The court erred in rejecting the testimony of Dr. Cress,[10] offered by appellant, that had the doctor known of appellee's prior injuries and their residual effects he would not have permitted appellee to act as a student fireman. After showing the circumstances (see p. 30 ff. below) appellant offered this testimony as follows:

"Q. (By Mr. Dunne): Now, Doctor, you have been doing this work for a great many years, have you not?

A. About twenty-eight years.

"Q. I want to assume this: I want to assume that in 1950, in August of 1950, a man came to you who is applying for employment as a fireman and that at that time he had a disability service-connected as the result of a war wound, a piece of shrapnel having gone into his left leg at about the middle third, resulted in a fracture of the femur; that he had been hospitalized for that for something over a year; that it had healed with

10. Appellant's physician who examined Appellee as an applicant for employment. See p. 32 below.

a slight deformity; that it had left him with scars; that it had left him with a slight restriction of motion of the left hip; that it had left him with a slight restriction of motion of the left ankle; that it had left him with a restriction of motion of the left knee; that thereafter he had fallen and fractured the patella of the left knee, the left kneecap, and had been hospitalized for that; and that in 1950 he was suffering from restriction of motion of his left knee so that he didn't have full bending of it, and some atrophy of the left leg and a slight restriction of motion in the hip and in the left ankle; that that was, the injury had been received in 1943, there had been a long recuperation, something over a year of hospitalization, and then some gradual improvement in the condition.

"Now, examining a man for a fireman, if you had known those facts, would you have passed that man for a fireman?

"Mr. T. Ryan: Just a moment. I make two objections to that: Number 1, that he is asking for a self-serving declaration on the part of one of their defendants, he is attempting to impeach the Doctor's own medical examination of the man, knowing about the fracture and observing with his own eyes the wounds made by the shrapnel; secondly, and entirely aside from that objection, as a second objection, as far as the hypothetical question is concerned, I object to it on the ground that he has left out some very vital factors which would have affected the doctor's medical decision, to wit: That the man had improved to such an extent that the United States Government, through the Veterans Administration, had reduced his disability from 70 per cent to 35 per cent to 10 per cent and he had only had a 10 per cent disability at the time of this physical examination whereby he was getting $15 a

month from the Government; and thirdly, he left out this vital factor which would play an important part in the doctor's opinion, the fact that the man, prior to seeking to employment with the Southern Pacific Company, had been doing hard physical labor in the nature of working eight hours a day digging ditches with a pick and shovel; that he had worked in a logging camp doing heavy work, that he had done stevedore work in the nature of loading and unloading cargo from both freight cars and boats, and that he had worked both as a wiper in the engine room of vessels where he was required to work in very cramped quarters and that he had worked as an ordinary seaman on vessels, and that he was able to walk with the disability in that left leg as much as seven miles a day.

"Mr. Dunne: I will add those factors to the question.

"Q. Doctor, did you hear what Mr. Ryan said?

"A. Yes, sir."

"Q. I will add those, too, to the factors he has accurately stated what some of the testimony is on that regard, take all those factors into consideration and with it in mind that this man, applying for the job of fireman, would you have passed that man?

"Mr. T. Ryan: Just a moment. I have no other objection, the first one, which was apart from the second one, that it calls for a self-serving declaration on the part of the Southern Pacific Company, and also an attempt to impeach his own physical examination which shows on the face of it that he saw the injury that the man had and knew of his compound fracture.

"The Court: Well, I think that this is not the field, Mr. Dunne, for the expert testimony. The casual relation of this man to the employment is a factual question for the jury to decide. I don't see that it is possible for expert testimony on the part of the examining

doctor; it would result in opinion and a conclusion which would be self-serving and would decide the matter rather than leaving it as a question of fact.

"I will sustain the objection.

"Mr. Dunne: Respectfully note the exception.

"Q. Now, Doctor, assuming that same set of facts —if your Honor please, I don't want to persist after your Honor has made the ruling, but I do want to make a record.

"The Court: Yes.

"Mr. Dunne: And there is, although the objection hasn't been put on the ground——I would like to put another question on that same set of facts.

"Mr. T. Ryan: Your Honor, ask the witness to wait until I make the objection, then, before he answers?

"The Court: All right.

"Q. (By Mr. Dunne): Now, Doctor, I want to assume that same set of facts and on that same set of facts put this question to you: Would such a man meet the standards of physical condition that were set for acceptance as a student fireman and for employment as a fireman?

"Mr. T. Ryan: Just a moment, object to that on the ground that that calls for the conclusion and opinion of the witness and calls for a self-serving declaration and also serves as an attempt to impeach his own medical examination when he had that information about his injuries and thirdly, on the ground that the answer would usurp the province of the jury in this case.

"The Court: Well, for the same reasons I will sustain the objection.

"Mr. Dunne: I have no further questions.

"I want, in this connection, if your Honor please, to make an offer of proof. Of course normally I should

do it with the witness on the stand. I assume it would not be proper to make it in the presence of the jury, but I offer to make the offer now and at the appropriate time I will enlarge on it.

"The Court: You may do that. I don't think it is necessary to preserve your record, because it is in the nature of questions.

"Mr. Dunne: I think that is perhaps true, but I would like to complete the record." (254-259)

"By Mr. Dunne:

"Q. Of course, that only takes up part of what you knew, Doctor, so let's take that entry and read the rest of it, follow the line of questions that Mr. Ryan put to you, 'Resulting compound fracture femur during early childhood.' That would also indicate to you what whatever this condition was he had overcome it and had gone through a good many years of it without it bothering him?

"A. That's right.

"Q. And if you had such a history, Doctor, having found out that a man had had a compound fracture of the femur in early childhood and had learned then that after that he had been accepted by the Marines, served with the Marines on active duty in a combat area, would such a history affect your opinion as to the results of any such fracture in early childhood?

"Mr. T. Ryan: Object on the grounds that it calls for the opinion and conclusion of the witness, as a self-serving declaration on his part, attempting to go against his own observations of the man in his physical examination, and on the ground that it usurps the province of the jury, speculative, and also not proper redirect.

"The Court: Well, I still think, Mr. Dunne, that is a jury question, rather than an opinion testimony of

the witness as an expert as to his opinion. It is for someone else to say that was of the nature that would affect his opinion rather than for him to say, because at best it could, it would only be in the hypothetical field.

"I will sustain the objection.

"Q. (By Mr. Dunne): And, Doctor, in arriving at a conclusion, forming an opinion as to the physical condition of the man and whether he should be accepted, this is as a matter of medical practice, is the history which is given to you by the man a matter which you, as a doctor, takes into consideration in arriving at your conclusion?

"Mr. T. Ryan: Object to that on the ground that that is incompetent, irrelevant and immaterial.

"The Court: Of course, that is a general question, he hasn't asked it with reference to this case.

"Mr. T. Ryan: No.

"The Court: I see no objection, no basis for the objection, and I will overrule the objection.

"The Witness: Question? I didn't get the question.

"The Court: All doctors take into account in making a diagnosis the history of the case.

"The Witness: Yes, sir.

"The Court: We all know that.

"Q. (By Mr. Dunne): And, Doctor, as a medical man, when a history is given to you and it is given to you untruthfully can you be misled as well as anybody else?

"Mr. T. Ryan: Object to that, that is leading and suggestive.

"The Court: Yes.

"Mr. T. Ryan: Calls for the conclusion of the witness.

"Mr. Dunne: I have no further questions.

"The Court: Sustained." (263-265)

"Mr. Dunne: Now, if your Honor please, to complete the record, and in respect to those first questions that were asked, which your Honor sustained the objections to, of course, my position is, in asking those questions, to complete the proof, my proving the ultimate fact that there are certain standards of physical condition that a man, such as described in the hypothetical question, would not meet those standards, if known, and applied by the doctor, and that in fact the defendant was misled by these misrepresentations, because had the doctor been told, then under the standard as set forth and under the practice of the doctor, such a man would not have been accepted as a fireman, for the purpose of showing reliance and being misled by the misrepresentations." (266)

9. The court erred, and abused its discretion in denying appellant's motion for a new trial, upon the ground that the damages awarded were excessive in fact, and as matter of law, that the award, as to amount, is not supported by the evidence and was the result of passion and/or prejudice.

III.

ARGUMENT

Some amplification of the facts is now necessary.

A. General Statement of the Facts.

Appellee's earlier injuries (see p. 3 above) were serious and permanently disabling. The injury of October 1943 was the result of being struck by shrapnel which shattered the femur or thigh bone of the left leg. It required removal of pieces of bone and hospitalization until Christmas of 1944. Appellee used crutches even for a time after

he was discharged from the Marine Corps in August 1945 (79). At the time of his discharge he was given a 70 per cent disability rating, later cut to 35 per cent. In August 1950, when he applied to appellant, he still had a 10 per cent disability rating (51 ff.; 76; 104 ff.). The fracture of the left knee while he was in Merchant Marine service likewise required an extended period of hospitalization (p. 4 above). He said, of the residual effects, that he had trouble in bending his knee, and his thigh was stiff (110). His physician, called to testify at the trial, described the condition of his left leg as follows:

> "I found also evidence of a disability of this patient's left lower extremity which was due to an injury he sustained in 1943 while in the Marine Corps. This injury also consisted of a fracture of his left femur and healed with restriction of left knee motion with a slight restriction of left hip motion, with no shortening, and I think very slight restriction of left ankle joint motion." (126)

He further testified that there was some bowing of the left thigh, some anterior-posterior instability of the left knee and that appellee had a congenital abnormality in his lumbar spine (140). He was not fitted to be a fireman.

The duties of the position for which appellee was applying called for some agility. A fireman does not just sit in the cab on a locomotive. Beyond handling the fire and water controls and keeping a lookout, he is called upon to do the following: He must take water and oil. To do this he must climb on the tender, open the manholes and then with a hook pull over the water column. He must climb the front of the locomotive and change the markers and indi-

cators and climb the rear of the tender and change and put up markers when the locomotive is running light. When the locomotive is running light, he must close switches and flag under Rule 99. On the Sacramento Division locomotives are used in helper service—extra locomotives helping trains up a grade—and when the helper service is completed the locomotive returns light to its base (201-203).

At the superintendent's office, in Sacramento, to which appellee was sent by Master Mechanic Lonergan (see p. 4 above), there was made out, and appellee signed, an application for employment. So far as we are concerned with it the parts were filled out by appellee, in his own handwriting, and the applications were then dated August 9, 1945, and signed by him. (Def. Ex. B (111 et seq.; 170); Def. Ex. C (149, 150; 169).) In these applications appellee deliberately and knowingly made materially false statements. He conceded that they were false and that he knew they were false when he made them.[11] The misstatements were of such character that the concessions could not be avoided. These are the false statements:

> 1. To the question asking for his schooling (the school, location, time attended, whether graduated and major subject) he answered: "Sylvan Grammar

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11. One of these misstatements appellee attempted to explain away on the ground of the misunderstanding of the question. The explanation was completely hollow. The others he attempted to explain away on the ground that he had told the fact either to Mr. Lonergan or to Dr. Cress. At best this created a conflict. We are not concerned here with the resolution of conflicts or whether the evidence is sufficient to support the verdict, but solely whether the Court committed error in excluding other evidence on the issue of fraud. It is not necessary, therefore, to state the plaintiff's testimony. It is enough, for the present purposes, to indicate that there was a conflict, not on the issue of false representation, but on the issue of reliance.

School, Citrus Heights, eight years; graduated, yes; major subject, grammar" and four years of high school and graduated (143, 144). The statement as to high school education was false and he knew it (78, 144, 145, 146).

2. To the question "Have you ever been injured or suffered an amputation? If so, state how, when, where and the nature thereof" he answered "No" (147). Obviously the answer was false and known to him to be false, and he finally conceded "that was an untruthful answer? A. Yes sir." (147)[12]

3.[13] To the question "Have you ever received a pension or disability rating from any government or organization? If so, give details" he answered "No" (151). The answer was obviously false and known to him to be false. At the very time he was receiving disability payments from the United States (151).

4. To the question "Have you ever been confined to a hospital for surgical operation or following an injury? If so, give details briefly" he answered "No" (151). The answer was false and known to him to be false when he made it (151).

Appellee was then sent to the company's examining physician, Dr. Cress, and took the application with him (151, 152). The doctor gave him an examination (152) and in his presence filled out other parts of the application (167). He then circled the application as accepted and gave it to appellee to bring back to the superintendent. Appellee did this (167). Upon the application, in the doctor's hand-

12. These two questions and answers are on Defendant's Exhibit B.

13. This question and answer and the next one are on defendant's Exhibit C.

writing, appears "multiple scars left thigh and slight deformity left thigh. Result of compound fracture of femur during early childhood." The doctor had no independent recollection of the occurrence but, obviously, this was information given by appellee in an attempt to explain away the scars on his left thigh (168, 249, 250).

On appellee's return to the superintendent's office, he, and others, were given a lecture on rules and regulations and on the use of care (54, 55, 154), he was told that he would be a student for two weeks and if he qualified he would go on the regular pay list (56, 155). He was told to report back to Master Mechanic Lonergan (56). He did so, and Lonergan sent him to Roundhouse Foreman Farrell and gave him two sheets of paper (56, 155). Apparently one of these is the document Foreman Farrell signed at the end of the first shift on which appellee went around with the fire lighters (see below). It was a printed form (Plf. Ex. 2), and so far as pertinent, provided "please see that ....., student, is thoroughly instructed in the duties of the position named and impress upon him the importance of thoroughly acquainting himself not only with the duties of that position but of any other with which he may be entrusted or to which he may aspire. * * * At conclusion of student trips with you, please fill out and sign the following report and forward it to my office. * * * Opinion as to fitness for position. Learning. A. M. Farrell." (59-61)

Appellee reported to Foreman Farrell on August 10, 1950, for the 3:59 p. m. roundhouse shift (47, 56, 57, 119). These were the instructions which Farrell gave him, and

these were the only instructions received; neither he nor anyone else testified to any other instructions:

"Q. Now, what, if anything, did Tim Farrell tell you when you reported to him?

A. He told me to keep my eyes and ears open and learn everything I could about being a fireman.

Q. All right. Did he assign you to anyone to show you what you were supposed to do?

A. Well, he told me to, if I could, follow these fire lighters. They were Spanish fellows, and couldn't—hard to understand their language, but I stayed pretty close to them.

Q. To follow the fire lighters?

A. Yes, sir." (57)

On the first day appellee did nothing but follow the fire lighters. They lit some fires. He lit none. One of them was always with him. (57-59; 155, 156).

The next day, August 11, 1950, appellee returned to the roundhouse at 3:59 p.m. (61, 119) and reported to Farrell but received no further instructions (61). Again he followed the same two fire lighters (61 ff.). There was always a fire lighter with him (156). He says that on this day he lit two fires, one on a mallet and one on a switch engine (62, 162).

Just before getting on the locomotive on which the accident happened the fire lighters "finished lighting all the fires and everything. The fire lighters told me just to stand around and watch and pick up whatever you can learn, can't help you any more, we have lit all the fires and the engines are ready." (62) He was standing in a corner just looking around when hostler Peterson came along (63).

Appellee testified that Peterson "was going to move an engine, asked me if I would like to go with him." (63) Peterson, called as appellee's witness, said "I just asked him what he was doing. He told me he was a student fireman, that he was taking his two shifts in the roundhouse, going around with the fire lighters, said that it was his second shift. I believe I made the statement that he would be all done after that he could make his road trips, or start his yard trips. * * * I asked him if he was busy right at the time and he wasn't. I said, 'Well I am going to move 2795 out.' More or less he took it for granted and we both got on the engine at about the same time." (188) Peterson did not directly request him to come along (204).

Peterson was not an engineer. He was a fireman who was qualified as an "inside" hostler, i.e., he was qualified to move locomotives on the roundhouse tracks but not outside the roundhouse, on the main line or yard tracks (177; 178 ff.; 199 ff.). He testified: "I have had experience with student firemen, I have had them on the road with me on several engine trips, road trips. **As far as in the roundhouse, why, they are not under my jurisdiction.**" (189)

The only testimony on the question of interstate commerce comes from Peterson. He testified: From Roseville trains go out of the state to Reno and north to Oregon (179 ff.). Mallets are used on trains that go to Reno and are kept in the roundhouse (163, 178, 185). Locomotive 2795, on which the accident happened, was used in road and switching service (156, 179). It had its fire burning and steam up (208) and was assigned to the "Bowman Turn"—a **local** freight service to Colfax and back to Roseville on which it did local work of taking loads and empties to

various places and picking up empties and cars loaded with perishables, to go into various trains (179 ff.; 208). He was going to take it to the sandhouse, on a preparatory track, one of the roundhouse tracks (179, 180, 187, 204, 205). This is all!

Appellee followed Peterson to Locomotive 2795. It was in the roundhouse (64). He got up in the cab and sat on the fireman's seat box. Peterson said nothing as to what he was to do (63, 64, 65). Peterson got in the engineer's seat (65, 189). He just watched Peterson (65). He touched nothing (65, 159, 160).[14] His only purpose was to learn something he had not learned (87). Peterson started to back the locomotive. It moved only a couple of feet. There was a flash-back of fire into the cab, and appellee jumped out the window feet first to the concrete floor some 12 feet below (65, 66, 70 ff.; 160; 190 ff.). He deliberately landed on his right leg in an endeavor to save his injured left leg (73, 160, 161). He fractured the femur of his right leg.

B. Appellee Was Not an Employee of Appellant Within the Meaning of the Federal Employees' Liability Act.

The facts are clear enough. Appellee was permitted upon the premises of appellant, for a two-week period, to learn something of the job of fireman so that he could pass an examination and qualify. If he qualified, he then would be hired as a fireman. During this two-week period he received no compensation. He belonged to a class popu-

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14. "Q. You didn't touch a thing? A. No, sir. Q. The only thing that you did until this fire came out of the door was just sit and watch? A. Yes, sir. Q. You didn't attempt to take any part in the handling of the locomotive at all? A. No, sir, I did not. Q. And you didn't intend to, did you? A. No, sir. Q. And nobody had asked you to? A. Nobody asked me; **I figured it was none of my business,** because he was backing the engine out." (159, 160).

larly known as "student fireman." Was he an employee within the meaning of the Federal Employers' Liability Act?

The question is sometimes approached as though there were magic in words. It is approached as though it were a purely legal and logical question whether a student—brakeman, fireman or what not—was an employee, and as though, this question once resolved in one situation, a magic content was given to the word "student" and wherever the word was popularly applied, the same legal result would follow. It will be found, however, on examination of the cases that no such simple "logical" course can be followed.

Usually "students" are not paid. They nevertheless may be employees. The fact that they receive no compensation is not determinative that they are not. This much is conceded. Appellee need cite no cases. But it does not follow from this that all "students" are employees. Further considerations must be looked to. These have been reviewed in *Watkins v. Thompson,* 72 Fed. Supp. 953 (E.D. Mo.—1947) and at this point the discussion in that case, supported by its review of the authorities, is sufficient.

In the *Watkins Case* plaintiff signed a student agreement which required him to serve without compensation to qualify for yard clerk work. The chief yard clerk turned him over to yard clerk Donovan, "with instructions to follow Donovan's orders."[15] The instructions to him also included

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15. Compare the case at bar. The only directions given to appellee were "to keep my eyes and ears open and learn everything I could about being a fireman. * * * Well, he told me to, if I could, follow these fire lighters." (57). He was not told to follow any instructions which the fire lighters might give him. There is no evidence that they did give him any directions as to what to do. And certainly at no place was he given any directions to do what some irresponsible hostler might tell him to do.

the performance of services. Accordingly, with the yard clerk, he went into the yard and checked the seals on one side of a train while the yard clerk checked the seals on the other side of the train. He actually performed service. What he did relieved the yard clerk of checking the seals on one side of the train. He and the yard clerk then went to a small house to get warm and were going to another train to check the cars in the same way when plaintiff was injured. The Court held that the defendant was not entitled to a judgment notwithstanding the verdict in favor of the plaintiff. The actual holding is no more than that the question was one of fact for the jury. In so holding, it held that:

(1) It was not conclusive that the plaintiff did not receive compensation. It did not hold, however, that this was not a fact which was entitled to consideration.

(2) It held that the "relation is usually dependent upon,

(a) "the right to direct the manner in which the work should be done"[16] and

b. Whose work it was which was being performed.[16]

The first of the tests suggested—the right of control of the person claimed to be an employee—is not as simple as appears at first blush. One type of control may indicate the master-servant relation. This is the right of control of the detail of activity in furthering the business of the person exercising the right of control. But there is another type of right of control which carries no such implications. This is the right of control exercised by any occupier of

16. Notice that both these statements assume that work was being done, i.e., that the "student" was in fact performing services and carrying on the master's business.

premises over persons who are on those premises solely in their own interests—a right of control not of activity in furtherance of the interests of the occupier of the premises, but a right of control solely to the end that there will be no unnecessary collision between persons independently pursuing their own interests, exercised only to the end of essential cooperation. This distinction has been recognized. In *Robinson v. B. & O. R. Co.,* 237 U.S. 34, 59 L.ed. 849, the claim was made that a Pullman porter on a railroad's train was its employee within the meaning of the Federal Employers' Liability Act. The Court held against this. The claim was in part founded upon the proposition that Pullman employees "were bound by the rules and regulations of the railroad company." It also appeared that "the Pullman Company employees to some extent furthered defendant's purposes and cooperated with its own employees." The Court said:

> "The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation."

So in *Hull v. Phila. & R. R. Co.,* 252 U.S. 457, 64 L.ed. 670, the employees of one railroad, while operating its trains on the rails of a second railroad, were subject to the rules and regulations of the second railroad. This did not make them employees of the second railroad, for "so far as they

were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies." Compare *Stevenson v. Lake Terminal R. Co.,* 52 F.2d 357 (Circ. 6); *Docheney v. Penn. R. Co.,* 60 F.2d 808 (Circ. 3); *Douglas v. Washington Terminal Co.,* 298 F. 199 (Circ. Dist. Col.); *Gaulden v. So. Pac. Co.,* 78 F. Supp. 651, 656 col. 2 (N.D. Calif.) aff'd 174 F.2d 1022 (Circ. 9) "on the grounds and for the reasons stated" in the opinion below. The same distinction is made in a case cited in the *Watkins Case, The F. B. Squire,* 248 F. 469, 471 (Circ. 2), which pointed out that careful distinction must be made "between authoritative direction and control and a mere suggestion as to details or necessary cooperation, where the work furnished is part of a larger undertaking."

The bare conclusion that there is some control is, then, colorless. Something more is necessary. It is necessary to find the character of control and the purpose for which it is exercised.

The second consideration noticed in the *Watkins Case* is that the asserted employee was doing some work—was performing some service—for the master. It will throw light on this to consider the actual facts of the cases relied upon in the *Watkins Case,* and the *Watkins Case* itself. It will be noticed in the *Watkins Case* that what the student was doing relieved the yard clerk of some work. In *Huntzacker v. Ill. C. R. Co.,* 129 F. 548, 549 (Circ. 6) the student "par-

ticipated in the performance of the duties of flagman."[17] In *McMillan v. Grand Trunk R. Co.,* 130 F. 827 (Circ. 1), deceased was killed while actually attempting to make a coupling.[18] In *Brown v. Chicago etc. R. Co.,* 315 Mo. 409, 286 S.W. 45, it appeared that the service was "to fire the engine," for deceased "ran the stoker, shoveled coal, and helped shake the grates and clean the cinders out of the pan."[19] In *Millsaps v. Louisville etc. Ry. Co.,* 69 Miss. 423,

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17. A student brakeman was killed in a rear-end collision. For some time he had been working on trains and "participated in the performance of the duties of flagman." On this particular train he continued "his practice of executing a flagman's duties." His agreement contemplated this, for in consideration of being permitted on the train, he "was to perform such elementary and simple service as he was capable of" and it was said while availing himself of the privilege "he was under a duty to perform the service expected of him." [Compare the very different agreement in the case at bar (see p. 16 above and part C below).] "He was enjoying the privilege and rendering the service at the time when he lost his life." The Court added: "We have no doubt of the correctness of the proposition contended for by counsel for the plaintiff that one who, **for his own purposes,** and by consent of another, assists that other in facilitating the discharge of a duty owed to himself, cannot be regarded as a servant of the other."

18. The facts are not stated with particularity. All that appears was that plaintiff "was set to work coupling freight cars, and was fatally injured while coupling them." The point with which we are concerned was not really raised. This the Court noticed. "It is not questioned that the deceased stood as a servant."

19. The Court, attempting to advance the conclusion it reaches, indulges in the dubious practice of assuming what the result would be in a different situation by suggesting that if the student fireman were negligent and a third person were injured, the railroad would be liable. This sort of argument does no more than assume the answer to the question. The propriety of this sort of argument is made highly questionable because the railroad might very well be liable to a third person, but on principles distinct from those of *respondeat superior*—upon the ground that it itself was negligent because proper functioning of a fireman is a non-delegable duty in the operation of a railroad. See *Robinson v. B. & O. R. Co.,* 237 U.S. 84, 59 L.ed. 849; *Magruder v. Yellow Cab Co.,* 141 F.2d 324 (Circ. 4); *Bowman v. Pace Co.,* 119 F.2d 858 (Circ. 5).

13 So. 696, again, the "student" was "working as fireman on a locomotive."[20] In *Weisser v. So. Pac. Ry. Co.,* 148 Cal. 426, 430, 83 P. 439, the "student" was actually doing the work of a brakeman on a train.[21] The same was true in *Atchison etc. Co. v. Fronk,* 74 Kan. 519, 87 P. 698.[22] *Findlay v. Coal & Coke Ry. Co.,* 76 W.Va. 747, 87 S.E. 198, involved not only service but actual payment of compensation, and calls for no comment.[23] In *Rief v. Great Northern*

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20. This case is of little help. A demurrer to the complaint was sustained upon the ground that the injury resulted from the act of a fellow servant. The complaint alleged that Millsaps was killed "while working on one of defendant's engines, acting as fireman." The fact so alleged was admitted for purposes of demurrer.

21. Here the injured man "was required to perform such ordinary duties of brakeman as were allotted to him." He was "regularly engaged in the doing of the defendant's business" and "was engaged in the service of the defendant."

22. Here the Court received in evidence the form of agreement under which the student brakeman was on the defendant's premises. It was the same general type of thing that the Court in the case at bar excluded when it excluded Defendant's Exhibit A for identification. It differed materially, however, in its terms, and by its terms clearly contemplated that the student should perform service. It recited that he had "requested the privilege of **working** on and about the locomotives, trains and cars of said railway company"; that the railroad should be relieved of liability for injuries sustained by him "while so **working**" and that he assumed all danger "of such **work**" and of injuries received "in or about such **work**" and that he was not to receive compensation "for any **work** that I may do during such time." Moreover, this is another case which came up on the pleadings. The complaint alleged that "he was in the service of the defendant," an answer was filed and the case came up on a ruling on demurrer to the answer. The Court stated that "the conclusion is irresistible that Tindell was in the service of the railway company" and it said "the services **which the agreement contemplated** that Tindell would perform for the company are sufficient to justify the conclusion that while performing such services he was an employee of the company" and that it appeared he "was working for the company, assisting in the operation of the train."

23. In this case the defendant, for reasons peculiar to certain defenses urged, "proved that the plaintiff's decedent was, at the time of his death, employed in the operation of the train." It further appears that he was paid. The Court said: "His employment, **his place on the payroll** of the company, implies service."

Ry. Co., 126 Minn. 403, 148 N.W. 309, it again appeared beyond dispute that the "student brakeman" was expected to and did actually perform services of a brakeman.[24] The last case is *Chesapeake & O. R. Co. v. Harmon's Adm'r,* 173 Ky. 1, 189 S.W. 1136. If anything, it is an authority against appellee, and is more appropriately dealt with at page 51 ff. below.

The facts of all of these cases differ radically from those of the case at bar. It may be that at some stage appellee, before he was qualified and was hired, would perform some service and would attain the status of an "employee." But he had not yet done so. It is beyond dispute that so far as his instructions from the foreman are concerned he was not instructed to perform any service. His only instructions were to keep his "eyes and ears open and learn everything I could about being a fireman" and to "follow these fire lighters." (p. 34 above). There is no evidence that any fire lighter gave him any direction or instruction to perform service. It is clear that he did not displace a fire lighter or confer any benefit on appellant by relieving any fire lighter of the performance of service. There was

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24. It clearly appeared that plaintiff was performing service, for he was injured "in attempting to descend from a box car to throw a switch." Again there was an agreement, and the Court points its significance by saying that "although there is nothing in the contract itself indicating that plaintiff as a student brakeman was to render any service whatever for defendant, the testimony conclusively shows that he was **expected to perform, and did perform,** such tasks as were assigned him." [There is no such testimony in the case at bar.] "He helped load and unload freight at way stations, threw switches, and did whatever he was ordered to do in the operation of the train." The implication is clear from this that if nothing more appeared than the agreement, he would not have been treated as an employee. The case is inconsistent with the holding that the agreement entered into is so far immaterial that it is to be excluded from evidence.

always a fire lighter with him (p. 34 above). He said that he lit two fires. The circumstances do not appear. He was not told to light any fires. So far as appears he did this wholly as a volunteer, and as a matter of experiment for his own benefit. It certainly does not appear that he did this in performing a service for appellant.

C. The Court Erred in Excluding Evidence on the Issue of Employment.

Assuming that we are wrong and that the question of employment presented an issue for the jury it still remains that the question should have been submitted to them in a proper frame of reference and with all of the facts disclosed.

To give the question its proper frame of reference appellant offered to show that there were 3 stations on the path to permanent employment as a fireman, student fireman, provisional fireman and permanent employee. It sought to do this by introducing a portion of the Firemen's Agreement (see p. 20 ff. above). This was excluded. To be sure, appellee was not a party to this agreement—he was not a fireman. But the agreement did show **as matter of fact** the system set up. The fact that there was a grade of relationship, in which service was performed, between student and regular employee served to place the status of student in its proper setting.

But far more important were the precise terms of the agreement under which appellee was on appellant's premises (see this set out p. 16 above). He agreed to "the understanding that I shall be under **no obligation to perform any work or service** upon said railroad until employed

by said company." Nowhere in the evidence is there anything to contradict this. It is not material that this is contained in a mere "Whereas" clause or as a recitation. It is evidence of a material fact and it was for this that it was offered.

So far as we are aware this is the only case in which such an agreement has been rejected. The agreement under which the student was on the railroad premises was received in the *Huntzacker Case* (see note 17 above), in the *Fronk Case* (see note 22 above), and in the *Rief Case* (see note 24 above). That in those cases the agreement tended to show that the student was an employee and in this case tends to show that he was not and that he was not to perform any work or service is certainly not ground for excluding it.

Appellee in this case was permitted to testify to part of the story of his relationship to appellant. Appellant was entitled to have the whole story shown—to have all the facts before the jury. In *Warrior-Pratt Coal Co. v. Shereda,* 183 Ala. 118, 62 So. 721, the question was whether plaintiff was an employee of defendant or an independent contractor. Defendant called a witness to show the nature and the character of the contract. The evidence was excluded. This was held error. "The Court also erred in restricting the defendant in its efforts to show the full contract or agreement between plaintiff and defendant. If they engaged to the 'usual' effect 'for driving rooms' in that mine, the terms that engagement comprehended were proper matters for the jury's consideration." *Cooney v. Glide,* 97 Cal. App. 77, held that a proposal, which never ripened into a contract, was admissible to show some of the

terms of the oral agreement which was finally reached—the materials to be used and how they were to be applied. It was one of the facts of the dealings of the parties although itself not an agreement. So an agreement which is illegal may be used to show the intention of the parties where there is no attempt to enforce it, i.e., it is admissible as a factual circumstance (6 *Williston Contracts,* rev. ed. § 1710, note 10). The rule is simple and elementary:

> "Any competent evidence, including the acts and declarations of the parties, the history of the transaction, and all the surrounding facts and circumstances, is admissible to prove the existence **and terms** of the contract."
>
> 17 C.J.S. 1238, Contracts, § 593.

> "The second axiom on which our law of Evidence rests is this: *All facts having rational probative value are admissible, unless some specific rule forbids.*"
>
> 1 *Wigmore, Evidence,* 3 ed. § 10.

For a more particular discussion of what may be looked to to find the terms of an agreement see *Wigmore, Evidence,* 3 ed. §§ 377, 2099, 2105, 2115; *Memphis Mining Co. v. Shackett,* 153 Ky. 476, 155 S.W. 1154, 1155[25]; *Van Drake v. Thomas,* ..... Ind. ..... 38 N.E.2d 878, 882, 883[26]; *Gulf etc. R.*

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25. The question was whether the relation of master and servant existed. The court said, quoting 26 Cyc. 971: "Whether or not the relation of master and servant exists in a given case is a question of fact, or of mixed law and fact, and is to be proved as any other like question. Generally speaking, any evidence tending to prove or disprove the relationship is admissible; its weight and sufficiency being left to the jury under the instructions of the court."

26. The question was of the relationship of master and servant. It was held not error to admit in evidence an automobile insurance policy containing an employer's non-ownership endorsement

Co. v. Graham, 153 Miss. 72, 177 So. 881[27]; *Wright v. Elk etc. Co.,* 129 Mich. 543, 89 N.W. 335; *Conrad v. Elksen Harvey Co.,* 120 Va. 458, 91 S.E. 763.[28]

The matter is fairly easily tested. Had the statement in the writing been that appellee was under a duty to perform such work and service as was directed there certainly would have been no objection and the court would have admitted it. The document is not less relevant and material because its terms are to the contrary and tend to disprove the position appellee takes.

D. Appellee Was Not Engaged in Interstate Commerce Within the Meaning of the Act.

It is beyond question that appellee would not have been held to have been engaged in interstate commerce so as to make the Federal Employers' Liability Act applicable as the Act read prior to 1939. Under the Act as it read before the 1939 Amendment the employee had the burden of proving that at the very moment he was injured he was engaged in interstate transportation or work so closely related thereto as to be practically a part of it (see note 5, p. 6 above). A roundhouse employee (assuming, for the mo-

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and showing the name of an employee. The court said: "The difference between an independent contractor and a mere servant is to be determined from the agreement as a whole. * * * Since the contract of employment between these parties was oral the question of whether a master-servant relationship existed was properly submitted to the jury and Exhibit 12 was admissible on this issue." Exhibit 12 was the insurance policy.

27. Again there was an issue of the relationship of the parties and whether the master-servant relationship existed. The court said: "Any competent and relevant evidence tending to prove or disprove the relationship in question was admissible."

28. The last two cases admitted expired contracts as evidence of the current relationship.

ment, employment) servicing an unidentified locomotive in the roundhouse—by consequence a locomotive not proved to have been assigned to interstate work—did not meet the requirements. (*Walton v. So. Pac. Co.,* 8 C.A.2d 290, 299-302, 48 P.2d 108;[29] *Shanks v. Delaware etc. R. Co.,* 239 U.S. 556, 60 L. ed. 436; *Chicago etc. Ry. Co. v. Bolle,* 284 U.S. 74, 76 L. ed. 173; *Chicago etc. R. Co. v. Ind. Com'n,* 284 U.S. 296, 76 L. ed. 304; *New York etc. R. Co. v. Bezue,* 284 U.S. 415, 76 L. Ed. 370; *Ind. Acc. Com'n of Calif. v. Davis,* 259 U.S. 182, 66 L. ed. 889.)

If the Act applies it must be by reason of the addition of a paragraph to § 1 in 1939 (45 U.S.C. § 51). This addition extended the coverage of the Act to two classes of employees, (1) those "**any part** of whose duties as such employees shall be in furtherance of interstate or foreign commerce" and (2) those whose duties "shall, in any way **directly or closely and substantially, affect** such commerce".

Remembering that the first paragraph of §1 was in no way changed by the 1939 Amendment, and that the Amendment was only by the addition of a paragraph, it is apparent that "interstate commerce" in the added paragraph has the meaning fixed by the decisions under the Act before the Amendment. The enlargement of the coverage was by the words we have put in bold face.

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29. The court held that the deceased was not engaged in interstate commerce when he was servicing a switch engine used to handle, indiscriminately, interstate and intrastate cars. Recovery was permitted even though it was held the Federal Employers' Liability Act did not apply because, so it was thought, recovery could be had if the Boiler Inspection Act alone applied. The case has been overruled for this last holding but the holding that the deceased was not engaged in interstate commerce was not disturbed. *Scott v. I. A. C.,* 9 C.2d 315, 320, 70 P.2d 940.

In *Ind. Acc. Com'n. v. Davis,* above, the court had this to say:

> "The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement—indeed, are necessary to it; but so are all attached to the railroad company—officials, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment **to the actual operation of the instrumentalities** for a **distinction between commerce and no commerce.** In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in **interstate transportation or in work so closely related to it as to be practically a part of it,** in order to displace state jurisdiction and make applicable the federal act."

The Act is then to be construed and applied, as to the 1939 Amendment, as though it provided that its coverage was of:

(1) Employees any part of whose duties as such shall be the furtherance of interstate transportation or work so closely related to it as to be practically a part of it; and

(2) Employees whose duties shall, in any way directly or closely and substantially, affect interstate transportation or work so closely related to it as to be practically a part of it.

The first part of the Amendment had a definite purpose. It was designed to cover those employees who at one time would be handling interstate cars and at another time, doing substantially the same type of work, would be

handling only intrastate cars. It was designed to make the application of the Act uniform as to them and not have them passing in and out of the Act as, unknown to them, the character of the cars they were dealing with changed from time to time. For example, a switchman would sometimes switch interstate cars and then again only intrastate cars. Or a road crew running 100 miles might for part of the run have interstate cars in the train and then these might be removed and for the rest of the run they would handle only intrastate cars. With this part of the Act we are not concerned. Whatever appellee was doing was the same throughout the only two shifts he was on the premises of appellant. If the Act applied to him at all it was because of the second provision of the Amendment—because he had duties which "directly or closely and substantially" affected interstate transportation or work so closely related to it as to be practically a part of it. This could be said of a student brakeman not merely observing, but actually working and performing service, on an interstate train or upon a train which, part of the time, had interstate cars or interstate shipments. But can it be said of plaintiff?

It certainly cannot be said that anything plaintiff did "in any way **directly**" affected interstate **transportation**—the actual movement of interstate cars or shipments—or work so closely related to such transportation as to be practically a part of it. Learning how to build a fire in a locomotive, or building a fire in an unidentified locomotive, by one whose employment and actual service upon a locomotive is wholly contingent and speculative certainly does not "directly" affect **interstate transportation.** Nor does it "closely and substantially" affect **interstate transportation.** (Cf. *Chic. etc. R. Co. v. Harrington,* 241 U.S. 177, 180, 60 L. ed.

941, 942.) This would be true even if it could be shown, or were shown, that appellee in what he did had some contact with locomotives used for interstate transportation. But not even this is shown. Cf. *Hallaway v. Thompson,* 148 Tex. 471, 226 S.W.2d 816 esp. on reh. 823 ff.; *Shoenfelt v. Penn R. Co.,* 69 F. Supp. 728 (S.D., N.Y.).

The only showing was that some trains operating in and out of the Roseville Yards were interstate trains and that some of the locomotives based at the Roseville roundhouse were used on such trains.[30] But the locomotives with which appellee had contact are wholly unidentified. Nothing is shown except that one was a mallet, one was a switch engine, and the 2795 was assigned to a local train. It is not shown that any engine was ever used to haul an interstate car. Indeed except as to the local engine, 2795, it is not even shown that the other engines were in service. For all that appears they had been taken out of service and were undergoing heavy repairs.

E. If Appellee Was an "Employee" He Departed from the Course of His Employment. In Any Event the Court Was Guilty of Prejudicial Error Touching the Issue.

We now assume a technical "employee" status. It remains to consider with more particularity what it was. If appellee had such a status it was status as an employee to follow the fire lighters. His instructions from the foreman were precise (see p. 34 above). He received no instructions to go on any locomotive while it was being moved. The work of the fire lighters on the second shift was completed (see p. 34 above). Then along came Peterson. He was a mere interloper. According to his testimony—the only testimony

30. The only evidence is that given by hostler Peterson, p. 35 above.

on the point—he had no jurisdiction of students in the roundhouse (see p. 35 above). His own statement would have been fortified had the court not improperly excluded Rule 864 when offered by appellant (see p. 11 ff. above). And then the court, improperly refusing to rule as matter of law that appellee had stepped aside from the course of his employment, ruled as matter of law that he had not and refused to submit this issue to the jury (Assignment of Error 4, p. 9 ff. above).

There is no doubt of the general rule that one who was an employee and who was injured but while deviating from the course and scope of his employment, cannot claim to be an employee at that time and so entitled to the benefit of statutes providing remedies for employees.

Mostyn v. Del. L. & W. R. Co., 160 F.2d 15 (Circ. 2 —cert. den. 332 U.S. 770, 92 L.ed. 355);[31]

Smith v. So. Pac. Co., 51 Nev. 390, 277 P. 609;[32]

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31. The employer provided a bunk car as sleeping quarters for employees. The employee took his bedding outside the car and slept on the right of way. Held, that the employee would have been an employee within the meaning of the Act, in the circumstances of this case, had he been sleeping in the bunk car but that in sleeping outside he deviated from the course of his employment. The court followed an earlier case for the rule "that any activity undertaken by an employee for a private purpose is certainly not within his employment."

32. A member of one train crew, at the request of a telegrapher, was attempting to give train orders to the engineer of a passing train. He was injured in the attempt. It was the duty of the telegrapher himself to hand the train orders to the engineer. It was held that the train crew member was not an employee within the Federal Employers' Liability Act for his act "was a volunteer service, an act of friendship for Lusk [the telegrapher], and not an act in the course of his employment, for which the defendant is liable. * * * He then became a volunteer and his own negligence was the sole cause of the injury." The situation was not changed because the telegrapher had requested him to do this. The telegrapher had no authority to assign duties to him.

Louisville & N. R. Co. v. Pettis, 206 Ala. 96, 89 So. 201, 204;[33]

C. & O. Ry. Co. v. Harmons Adm'r, 173 Ky. 1, 189 S.W. 1136.[34]

Compare:

Lavender v. Ill. C. R. Co., 358 Mo. 1160, 219 S.W.2d 353, cert. den. 338 U.S. 822, 94 L.ed. 499 and 338 U.S. 881, 94 L.ed. 541;

Dalsheim v. Ind. Acc. Com'n, 215 Cal. 107, 8 P.2d 840;

Calif. C. I. Exch. v. Ind. Acc. Com'n, 190 Cal. 433, 213 P. 257;

Highway Com'n v. Ind. Acc. Com'n, 61 Cal. App. 284, 287, 214 P. 658;

Peccolo v. Los Angeles, 8 C.2d 532, 535, 66 P.2d 651;

Gordoy v. Flaherty, 9 C.2d 716, 72 P.2d 538.

The rule is peculiarly applicable to one who is acting in violation of rules, orders or instructions (*Bourne v. So. Ry. Co.,* 225 N.C. 43, 33 S.E.2d 239; *Nat. Auto. Ins. Co.*

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33. "If the particular service plaintiff was performing (when injury befell him) was outside the scope of his employment, or was not directed or enjoined upon him by a representative or representatives of the defendant authorized to control plaintiff's service, or this particular service was not knowingly acquiesced in by a representative who had authority to control the plaintiff's service in that regard, the plaintiff's relation to that corporation would be referable to his voluntary act, and the defendant would not be responsible for his injury." The case was one under the Federal Employers' Liability Act and a state liability act.

34. A student fireman left the locomotive of the train, went into the caboose and went to sleep. He did this in defiance of requests that he go upon the locomotive. He was killed in a rear end collision. Held, that he had deviated from the course of his employment.

v. Ind. Acc. Com'n, 8 C.2d 715, 68 P.2d 361[35] and cases there cited; *Ind. Indem. Exch. v. Ind. Acc. Com'n,* 86 C.A.2d 202, 194 P.2d 552). In going on locomotive 2795 appellee clearly violated his instructions, which were to follow the fire lighters. His instructions were to observe the lighting of fires on standing locomotives. He was given no instructions to go on any locomotives when they were moved. Further, had Rule 864 been admitted in evidence it would have been clear that he was in violation of that Rule expressly providing that "persons must not be permitted to ride on an engine * * * without a written order from the proper authority, except employees in the discharge of their duties." (See p. 12 above).

The facts of this case point the reason and significance to the Rule. The firebox door opened toward the fireman's side of the cab. It was propped open with a sand scoop. Appellee proved abundantly that this was in clear violation of rules designed to prevent accidents just such as this (196 ff.). The rules state clearly and without ambiguity that the fire door must be kept securely latched. Any experienced man who got in the cab of the locomotive would have seen in an instant that the rule was being violated and would have realized the significance of the violation. Appellee noticed that the fire door was open as soon as he got in the cab (70, 71, 157). He sought to excuse his own failure to

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35. This case and the cases cited are of interest because in them there are instructions that the employee was not to go about his work until the happening of a specified event. His conduct before the happening of that event was outside the scope of his employment. The cases are of interest because the converse of the case at bar. Appellee was injured after all of the matters to which he had been directed—the lighting of fires on locomotives—had been completed. The fire lighters had told him that all the fires were lit and there was nothing more to do.

take steps against the risk presented by his own ignorance and want of appreciation of the danger. "I noticed it was open, but I didn't pay any attention to it, because I figured it was supposed to be that way. Q. Did anyone ever tell you that the door was not supposed to be open? A. No, sir. Q. No one gave you any instructions one way or the other on that? A. No, sir." (71) This is just the reason why unauthorized persons are forbidden to go on locomotives.

Libbey's conduct was not less a deviation from his "employment" and a violation of instructions and the rules because he was asked to go upon the locomotive by hostler Peterson. This is the second significant aspect of Rule 864. Taken together with Peterson's own testimony that as an inside hostler he had no jurisdiction over student firemen it makes it clear that he had no authority to ask appellee to go upon the locomotive or authorize him to go upon it—that this was not an act of appellant (cf. *Smith v. So. Pac. Co.,* note 32 above and see note 33 above).

Nor was appellee's conduct any less a deviation from his "employment" because he was endeavoring, if he was endeavoring, to learn something which would qualify him for employment as a fireman. Conduct beyond the scope of assigned duties is no less a deviation from the employment, because the employee is endeavoring to learn something which will make him more valuable to his employer (*Young v. Dept. of L. & I.,* 200 Wash. 138, 93 P.2d 337).

In connection with this whole matter *Bourne v. So. Ry. Co.,* 225 N.C. 43, 33 S.E.2d 239, cited above, is most instructive. In this case a qualified locomotive engineer was riding over a section of the line of the railroad to acquaint himself with it and to qualify himself to operate over it. In

violation of rules he took the place of the regular engineer and was operating the locomotive. It was held that he was not an employee within the meaning of the Federal Employers' Liability Act and that the Act did not apply.

F. The Court Erred in Excluding Evidence on the Issue of Fraud in Procuring Permission to Go on Appellant's Premises.

The rule is settled that one who procures his employment by fraud is not entitled to the benefits of the Federal Employers' Liability Act (*Minn. etc. R. Co. v. Rock,* 279 U.S. 410, 73 L. ed. 766). The only qualification is that the fraud must be of such character as to have some causal relation to the claim under the Act (*Minn. etc. R. Co. v. Borum,* 286 U.S. 447, 76 L. ed. 1218). Most of the cases sustaining a finding that there was no such fraud are cases in which there was misrepresentation as to age and in which the employee by a very considerable period of active service had demonstrated that without regard for his age he could do his job. Upon the other hand the rule of the *Rock Case* has peculiar application to cases like the *Rock Case* where the misrepresentation was of physical condition and physical capacity to work. The rule of the *Rock Case* was applied in the following cases:

Norfolk & W. R. Co. v. Bondurant, 107 Va. 515, 59 S.E. 1091 (student fireman—misrepresentation as to age);

Stafford v. B. & O. R. Co., 262 Fed. 807 (N. D. W. Va.—misrepresentation as to physical condition);

Ft. Worth etc. Ry. Co. v. Griffith (Tex. Civ. App.), 27 S.W.2d 351 (misrepresentation as to physical condition);

Clark v. Union P. R. Co., ... Ida. ....., 211 P.2d 402 (misrepresentation as to physical condition).

Appellee misrepresented his physical condition to Dr. Cress, appellant's examining physician charged with the duty of passing upon applicants for employment for physical fitness (see p. 31 ff. above). Part of the showing required of appellant was to show that the misrepresentations were material and that had the truth been known appellee would not have been passed. To this end it was necessary for it to show that had Dr. Cress known the truth he would not have passed appellee. It was necessary for appellant to show that appellee's physical condition, as a result of earlier injuries, was such that he did not measure up to the standards of physical fitness required for employment as a fireman. When appellant undertook to prove these matters its evidence was excluded (see p. 23 ff. above). This was error. It was entirely proper for appellant to show both (1) that its examining physician would not have passed appellee had he known the truth and to prove this by the testimony of the examining physician himself and (2) to show from this examining physician what appellant's standards were and that appellee did not meet them.

Against such objections as were urged—that the question called for the conclusion of the witness and invaded the province of the jury—courts have repeatedly held that such testimony is admissible. In *Bernstein v. Gross,* 58 F. 2d 154, 155 (Circ. 5) the charge was fraud. The victim testified that he relied on the representation and it was held that his testimony that he "would not otherwise have parted with his money, is admissible evidence of a fact best known to himself." *Metropolitan L. Ins. Co. v. Becraft,* 213 Ind. 378, 12 N.E.2d 952 was an action on an insurance policy. The defense was fraudulent misrepresentations as to physical condition and prior treatment by a physician. The em-

ployee of the insurance company whose duty it was to pass on applications was asked whether, if he had known the truth, he would have approved the application. It was held that "the question was competent. A party may testify that he would not have entered into a transaction if he had known the truth, just as he may testify as to his motive or intention." *Lawrence v. Conn. M. L. Ins. Co.,* 91 F.2d 381, 384 (Circ. 6) was a similar case. It was said that an objection to the testimony of defendant's assistant medical director that had he known the true facts as to the applicant's physical condition, he would not have accepted the policy was "utterly lacking in merit." *Gilbert v. Inter-Ocean Casualty Co.,* 41 N.M. 463, 71 P.2d held that it was reversible error to reject evidence that the officer who passed on an application would not have approved it had he known of the existence of three other policies since "the burden rested on appellant to show that the statement was material." Accord: *New York L. Ins. Co. v. Tuhlenschmidt,* ..... Ind. ....., 31 N.E.2d 1000; *Thompson v. New York L. Ins. Co.,* 143 Fla. 534, 197 So. 111; *International Trust Co. v. Myers,* 241 Mass. 509, 135 N.E. 697, 699; *Breshears v. Callender,* 23 Ida. 348, 131 P.15, 19.[36]

Even if there were doubt—and there is not—the evidence should have been admitted for "in any case, the statute or rule which favors the reception of the evidence governs" (Fed. Rules Civ. Proc., Rule 43 (a)).

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36. "By the weight of authority, testimony of plaintiff that he would not have entered into the transaction had he known the truth or had not the representations been made is competent as being the statement of a fact peculiarly within the knowledge of the witness and hardly susceptible of proof in any other way, and this notwithstanding the objection that the testimony is a mere conclusion."

The first question, what the doctor would have done had he known the truth, was proper. The second question was even more proper. It asked for a standard and called upon a qualified expert to express an opinion as to whether stated facts met a known standard. This is the classical function of expert testimony. (Cf. *Sheehan v. Board of Police Com'rs,* 197 Cal. 70, 77, 234 P.844; *United States v. Francis,* 64 F.2d 865 (Circ. 9).)

G. The Verdict Is Excessive.

In a case which, on its facts, is proper for the exercise of the power, this Court has power to give relief if an award of damages is excessive as matter of law or is the result of passion and prejudice. (*Cobb v. Lepisto,* 6 F.2d 128, 129 (Circ. 9); *Dept. of Water and Power v. Anderson,* 95 F.2d 577, 586 (Circ. 9); *So. Pac. Co. v. Guthrie,* 186 F. 2d 926 (Circ. 9); *Covey-Gas Oil Co. v. Checketts,* 187 F. 2d 561 (Circ. 9).)

This case is a puzzling one because of the condition of appellee's left leg resulting from his wound in 1943. Strangely enough the injury to the left leg and the injury to the right leg were substantially the same and had substantially the same effects. Both resulted in a fracture of the femur at approximately the junction of the lower and middle third. Both fractures healed with a bowing. In the right leg a shortening resulted. Both produced limitation of motion in the knee and some slight restriction of motion in the hip and ankle. At the time of trial appellee was still experiencing some incapacity as the result of the injury to the right leg. He tired readily, had some difficulty in walking, particularly going up and down stairs, and tired

in standing (97 ff.; 125 ff.). The injury was of a type that calls for a considerable period of recuperation. But, that with time, improvement will come could not be better demonstrated than in his own case of injury to the left leg. Injured in 1943 he was still using crutches when he was discharged from the Marines in 1945 (see p. 29 above) and yet, thereafter, there was continued and steady improvement.

It will not do to speak simply of his disability or incapacity for work. The condition of the left leg is a contributing factor. For this appellant is in no sense responsible. Yet, beyond doubt, the jury took this into consideration. It looked at the whole man and made an award to compensate for his present condition, part of which was not attributable to the injury of 1950. Nothing could demonstrate better than this award the very real importance to appellant of knowing the truth as to his physical condition before it permitted him to go upon a locomotive.

We could search the books and produce for the Court cases of awards where the injuries were parallel. Collections of cases are readily available. (See 25 C.J.S. 914 ff., particularly 954 ff.; 46 A.L.R. 1230 ff., particularly 1353 ff.; 102 A.L.R. 1125 ff., particularly 1405 ff.). It is difficult to say that examination of the cases is likely to be of great assistance here. The simple fact is that if proper compensation for the injury to the right leg is $50,000 proper compensation for injury to the other leg would be substantially the same. It is submitted that the total incapacity of the man is not such as would warrant compensation of $100,000.

Appellee is a young man. He has had no special training in any given line of endeavor which is now lost to him.

There is no injury to his upper extremities. He is susceptible of training and rehabilitation. There is no evidence which would indicate that he is an economic derelict. He can have a full and useful life. He has available to him the facilities of both federal and state services designed to fit him for a useful life.

It is submitted that the verdict represents not compensation but penalization.

CONCLUSION

It is respectfully submitted that the judgment must be reversed.

Dated at San Francisco, California, November 14, 1951.

Arthur B. Dunne
Dunne, Dunne & Phelps
Attorneys for Appellant.